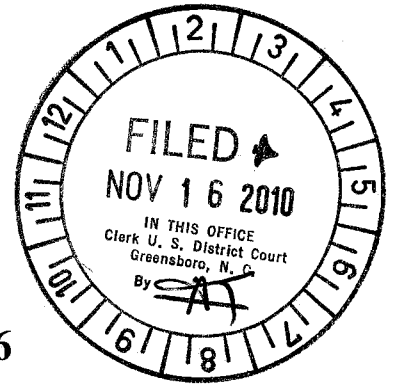


1 Joseph Trinidad & Anthony E. Paupaw
2 3513 Covent Oak Court
3 High Point, NC 27265
4

5 UNITED STATES DISTRICT COURT
6 DISTRICT OF OREGON



JOSEPH TRINIDAD & ANTHONY E.
PAUPAW

Case # 10-716

Plaintiff,

vs.

**PLAINTIFFS REPLY TO
DEFENDANTS MOTION TO
DISMISS COMPLAINT**

OCWEN LOAN SERVICING LLC

Dated: November 16, 2010

Defendant

7
8 (1) The Plaintiff, in her Original Petition, plead that Defendant charged false fees as
9 stipulated to Plaintiff as listed on the HUD 1 Settlement Statement.

10 Plaintiff specifically plead that Defendant, at the time of settlement of the contract,
11 Defendant failed to provide documentation to establish that said fees were not included in
12 those fees expressly addressed by the Real Estate Settlement Procedures Act as forbidden
13 to be charged to Plaintiff at settlement.

14 (2) Plaintiff stipulated each fee charged with particularity. Plaintiff calculated the precise
15 amount that Plaintiff would have overpaid the note had Plaintiff paid off the note as
16 stipulated by the Truth In Lending Statement provided by Defendant.
17 Plaintiff specifically alleged that said fees were fraudulent. Plaintiff alleged that
18 Defendant failed to provide full disclosure by failing to provide documentation to prove
19 that the above fees were authorized by law, that the services alleged provided were
20 necessary, that the amount charged for each service was necessary, and that Defendant
21 did not take an undisclosed markup on said fees.

22 (3) Plaintiff further alleged that Defendant, acting in concert and collusion with the loan
23 broker, toward the perpetration of a carefully contrived connivance, provided the
24 amounts listed in the HUD 1 Settlement Statement, to the loan broker as an undisclosed
25 yield spread premium. Said undisclosed yield spread premium is alleged to be in

addition to the one percent loan origination fee, charged to Plaintiff, as allowed by law. Plaintiff alleged that said payment to the broker of undisclosed yield spread premium was a predicate act intended to improperly influence loan broker to misrepresent facts to Plaintiff, to give partial disclosure of those facts which would appear favorable to the intent of the loan broker, while failing to give full disclosure of other facts that would not seem favorable to the contract.

(4) By the above, Plaintiff stated a claim for which recovery could be had, and therefore, Defendant's motion to dismiss is frivolous. Plaintiff moves the court to deny Defendant's pleading, or, in the alternative, treat Defendant's pleading as a request for more definite statement, in which case, Plaintiff will provide a more definite statement as requested.

(5) Further, Plaintiff moves the court to order sanctions against Defendant for filing a frivolous pleading and for failing to speak with candor to the court as Defendant is totally inept or acted with deliberate intent to improperly influence the court with false pleadings.

STATUTE OF LIMITATIONS/ EQUITABLE TOLLING

(6) Plaintiff acted with due diligence by dealing only with licensed professionals. Plaintiff, by so doing had cause to trust in the proactive statements of Defendants concerning the true value of the property, the condition of the real estate market, and the propriety of the fees charged to Plaintiff at closing. Defendants acted with deliberate malice toward Plaintiff in that Defendants by making proactive statements to Plaintiff that revealed certain facts which would give a reasonable person of ordinary prudence cause to believe the current loan was properly priced and that said loan was the only loan Plaintiff qualified for while withholding facts which would have given Plaintiff full disclosure. Defendants actively concealed the complete truth from Plaintiff with the intent of defrauding Plaintiff.

a. The Eleventh Circuit stated that "in deciding whether the statute should be tolled, it must be determined whether a 'reasonably diligent plaintiff' would have discovered the fraud." *Id.* (*Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998)).

(7) Plaintiff, once put on notice of the pervasive fraud affecting the real estate industry, acted immediately with due diligence and engaged professionals to examine into the propriety of the practices engaged in by Defendants.

- 58 a. The First Circuit, based on the same rationale as the Seventh Circuit, has stated
59 that while "'storm warnings' of the possibility of fraud trigger a plaintiff's duty to
60 investigate in a reasonably diligent manner, . . . his cause of action is deemed to
61 accrue on the date when he should have discovered the alleged fraud." Maggio v.
62 Gerard Freezer & Ice Co., 824 F.2d 123, 128 (1st Cir. 1987).

63 (8) Defendants acted in concert an collusion, one with the other, in an organized scheme
64 wherein, from the beginning, one predicate act after another was committed against
65 Plaintiff in order to establish trust, then use that trust to perpetrate fraud against Plaintiff
66 by systematically making false claims to Plaintiff in order to induce Plaintiff into entering
67 into an express contract that was based on fraud. Plaintiff acted in good faith in all things
68 and with due diligence by only dealing with licensed professionals. In as much as all
69 actors were professionals, duly licensed by the state and federal governments and all
70 governed by the relevant consumer protection laws, Plaintiff had cause to expect good
71 faith and fair dealings from said licensed professionals.

- 72 a. "Every contract imposes upon each party a duty of good faith and fair dealing in
73 its performance and its enforcement." *Price v. Wells Fargo Bank*, 213
74 *Cal.App.3d* 465, 478, 261 *Cal. Rptr.* 735 (1989); [*15] *Rest.2d Contracts* § 205.
75 A mortgage broker has fiduciary duties. *Wyatt v. Union Mortgage Co.*, (1979) 24
76 *Cal. 3d* 773. Further, In *Jonathan Neil & Associates, Inc. v Jones*, (2004) 33
77 *Cal. 4th* 917.
- 78 b. "A person who provides brokerage services to a borrower in a covered loan
79 transaction by soliciting lenders or otherwise negotiating a consumer loan
80 secured by real property, is the fiduciary of the consumer...this fiduciary duty [is
81 owed] to the consumer regardless of whom else the broker may be acting as an
82 agent for . . . The fiduciary duty of the broker is to deal with the consumer in
83 good faith. If the broker knew or should have known that the Borrower will or
84 has a likelihood of defaulting ... they have a fiduciary duty to the borrower not to
85 place them in that loan." (*California Department of Real Estate, Section 8:*
86 *Fiduciary Responsibility*, www.dre.ca.gov).

87 (9) Plaintiff had no notice of wrong doing until the improprieties of the real estate market
88 were finally made public in the popular media.

- 89 a. Other courts have indicated the one-year limitations period commences when the
90 plaintiff is placed on inquiry notice, unless the plaintiff can show the actual
91 exercise of reasonable diligence to discover the fraud. If the plaintiff can show
92 the exercise of such diligence, the limitations period begins to run when the
93 plaintiff actually discovers the facts underlying the alleged fraud. If, however, the
94 plaintiff cannot show such actual diligence, constructive knowledge of the fraud
95 is imputed to the plaintiff as of the date of inquiry notice. For example, in Dodds
96 v. Cigna Securities, Inc., 12 *F.3d* 346 (2d Cir. 1993), the Second Circuit stated
97 that "when the circumstances would suggest to an investor of ordinary
98 intelligence the probability that she has been defrauded, a duty of inquiry arises,
99 and knowledge will be imputed to the investor who does not make such an
100 inquiry." *Id. at* 350. The Dodds court further stated that the doctrine of "equitable
101 tolling will stay the running of the statute of limitations only so long as the

102 plaintiff has exercised reasonable care and diligence in seeking to learn the facts
103 which would disclose [**35] fraud." Id. (internal quotations omitted). *Sterlin v.*
104 *Biomune Sys.*, 154 F.3d 1191, 1201.

105 (10) When Plaintiff became aware of potential fraud by the licensed professionals
106 Plaintiff had been induced to trust, Plaintiff made due diligent inquiry and discovered the
107 fraud complained of herein.

108 a. Plaintiff exercised due diligence and the time limitations in the Truth in Lending
109 Act should be tolled so that the intent of the Legislature may be realized. The
110 Seventh Circuit, essentially merging the inquiry notice and reasonable diligence
111 standards into one governing standard, has indicated that a plaintiff is not put on
112 inquiry notice until the plaintiff reasonably should have discovered the fraud. *See*
113 *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 (7th Cir. 1997) ("Inquiry
114 notice does not begin to run unless and until the investor is able, with the exercise
115 of reasonable diligence (whether or not actually exercised), to ascertain the
116 information needed to file suit."); *see also Law v. Medco Research, Inc.*, 113
117 F.3d 781, 785 (7th Cir. 1997) ("The plaintiff gets a year after he learned or
118 should have learned the facts that he must know to know that he has a claim.").
119 An earlier Seventh Circuit case, however, rejected the plaintiff's argument that
120 "in spite of reasonable diligence, it could not discover the facts underlying the
121 defendants' fraud" and held that the one-year limitations period began to run once
122 the plaintiff was placed on inquiry notice of the possibility of fraud. *Whirlpool*
123 *Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 & n.3 (7th Cir. 1995). *Sterlin*
124 *v. Biomune Sys.*, 154 F.3d 1191, 1201.

125 (11) In the alternative, the acts as alleged against Defendants amount to criminal fraud
126 in that, in a scheme to deceive and mislead Plaintiff, Defendants, by sham and trickery,
127 induced Plaintiff into entering into a predatory loan contract wherein Plaintiff was
128 charged amounts not allowed by law. Defendants, in perpetrating the above referenced
129 predicate acts toward their carefully crafted criminal conspiracy, relied on the trust
130 engendered by the laws intended to protect Plaintiff and others similarly situated from
131 just the sort of abuse visited on Plaintiff. Plaintiff alleges a scheme of fraud and,
132 therefore, upon proof at trial, Plaintiff has a right to seek common law equitable
133 recoupment.

134 **A. TENDER BY SETOFF**

135 (12) Plaintiff has alleged a conspiracy on the part of all defendants which gives
136 Plaintiff a claim against all defendants equally as coconspirators, Plaintiff has an
137 equitable right to claim tender by setoff against the claims herein made against
138 defendants.

PLAINTIFF MADE CLAIMS WITH SPECIFICITY AND PARTICULARITY

(13) Plaintiffs alleged that the original lender overpaid the loan originator, with fees improperly charged to Plaintiff at closing in order to induce the originator of the loan to breach his fiduciary duty to Plaintiff. By doing this, they committed common law fraud by making false statements to Plaintiff in order to convince Plaintiff that Plaintiff only qualified for a more expensive loan product than Plaintiff actually qualified for. Plaintiff is prepared to prove up said claims after discovery, at a trial on the merits.

(14) Plaintiff alleged that Defendant(s) made partial disclosure of alleged facts concerning the conditions of the loan which is the basis for the issuance of the security instrument and lien document at issue. Plaintiff is prepared to prove at trial, after complete discovery that Defendant(s) failed to give full disclosure of facts that, if disclosed would have caused Plaintiff to make a different decision than the one made.

(15) Plaintiff alleged that the trustee, at closing, executed a carefully contrived connivance intended to apply undue pressure on Plaintiff in an effort to effect lack of full disclosure to Plaintiff and induce Plaintiff to enter into a contract without said full disclosure. Plaintiff is prepared to provide proof, at trial, sufficient to convince a jury.

(16) Plaintiff alleges that, at closing, false fees were charged to Plaintiff by lender. Said allegations are reiterated below with specificity. Plaintiff alleged that the original lender sold the security instrument immediately after closing, but failed to transfer the lien document to the purchaser of said security instrument. Plaintiff is prepared to prove, subsequent to discovery, that the lender, while still holding the security instrument, received consideration and, therefore, could not be harmed rendering the lien unenforceable.

(17) Plaintiff alleged, and is prepared to prove at trial, that the lender maintained possession of the lien document in order to be able to file an IRS Form 1099a and write the entire amount of the original note off lender's capital gains tax and, thereby, receive consideration a second time.

(18) Plaintiff alleged, and is prepared to prove at trial that, the original security instrument, if said instrument still exists, may give the holder a claim against the signator, but have no claim against the property.

(19) Plaintiff alleged, and is prepared to prove at trial that, OCWEN Loan Servicing LLC, and the attorneys claiming to represent same, have committed fraud by representing

to the court that OCWEN Loan Servicing LLC is as real party in interest in the contract of sale and has standing to take said property from defendant when no such claim exists.

(20) Plaintiff has alleged, and is prepared to prove at trial, that the defendant(s), by claiming standing to express the provisions of the contract of sale and lien, claim to be real parties in interest and, therefore, under the Federal Trade Commission Holder Rule 16 CFR 433, are subject to any claim Plaintiff may have against the original lender.

B. LENDER CHARGED FALSE FEES

(21) Lender charged fees to Plaintiff that were in violation of the limitations imposed by the Real Estate Settlement Procedures Act as said fees were simply contrived and not paid to a third party vendor.

(22) Lender charged other fees that were a normal part of doing business and should have been included in the finance charge.

(23) Below is a listing of the fees charged at settlement. Neither at settlement, nor at any other time did Lender or Trustee provide documentation to show that the fees herein listed were valid, necessary, reasonable, and proper to charge Petitioner.

801	Loan Origination Fee	\$2,686.40
811	Commitment Processing Fee	\$550.00
812	Broker Fee	\$671.60
813	Tax Service Fee	\$60.00
814	Flood Cert Fee	\$7.00
815	MERS Fee	\$3.95
901	Interest from 12/21/2005 to 01/01/06 @\$ 30.18 /day	\$331.98
1001	Hazard Insurance	\$195.24
1004	County Property Taxes	\$1,162.07
1106	Notary Fee	\$8.00
1107	Attorney Fee	\$550.00
1108	Title Insurance	\$358.80
1112	Courier Fee	\$45.00
1113	Recording Fee	\$83.00

(24) Debtor is unable to determine whether or not the above fees are valid in accordance with the restrictions provided by the various consumer protection laws. Therefore it was demanded to please provide;

- a. a complete billing from each vendor who provided the above listed services;
- b. the complete contact information for each vendor who provided a billed service;

- c. clearly stipulate as to the specific service performed;
- d. a showing that said service was necessary;
- e. a showing that the cost of said service is reasonable;
- f. a showing of why said service is not a regular cost of doing business that should rightly be included in the finance charge.

(25) The above charges have been disputed and deemed unreasonable until such time as said charges have been demonstrated to be reasonable, necessary, and in accordance with the limitations and restrictions included in any and all laws, rules, and regulations intended to protect the consumer.

(26) In the event lender fails to properly document the above charges, borrower will consider same as false charges. The effect of the above amounts that borrower would pay over the life of the note will be an overpayment of \$565,076.79. This amount will be reduced by the amount of items above when said items are fully documented.

C. RESPA PENALTIES

(27) From a cursory examination of the records, with the few available, the apparent RESPA violations are as follows:

- a. Good Faith Estimate not within limits
- b. No HUD-1 Booklet
- c. Truth In Lending Statement not within limits compared to Note
- d. Truth in Lending Statement not timely presented
- e. HUD-1 not presented at least one day before closing
- f. No Holder Rule Notice in Note
- g. No 1st Payment Letter
 - 1. No signed and dated :
 - 2. Financial Privacy Act Disclosure;
 - 3. Equal Credit Reporting Act Disclosure;

- 218 4. notice of right to receive appraisal report;
219 5. servicing disclosure statement;
220 6. borrower's Certification of Authorization;
221 7. notice of credit score;
222 8. RESPA servicing disclosure letter;
223 9. loan discount fee disclosure;
224 10. business insurance company arrangement disclosure;
225 11. notice of right to rescind.

226 (28) The courts have held that the borrower does not have to show harm to claim a violation of
227 the Real Estate Settlement Procedures Act, as the Act was intended to insure strict compliance.
228 And, in as much as the courts are directed to assess a penalty of no less than two hundred
229 dollars and no more than two thousand, considering the large number enumerated here, it is
230 reasonable to consider that the court will assess the maximum amount for each violation.

231 (29) Since the courts have held that the penalty for a violation of RESPA accrues at
232 consummation of the note, borrower has calculated that, the number of violations found in a
233 cursory examination of the note, if deducted from the principal, would result in an
234 overpayment on the part of the borrower, over the life of the note, of \$672,750.20.

235 (30) If the violation penalty amounts for each of the unsupported fees listed above are
236 included, the amount by which the borrower would be defrauded is \$712,012.11

237 (31) Adding in RESPA penalties for all the unsupported settlement fees along with the
238 TILA/Note variance, it appears that lender intended to defraud borrower in the amount of
239 \$2,747,956.45


240 **MORE DEFINITE STATEMENT**

241 (32) Plaintiff is willing to prepare a more definite statement for the court. Subsequent to the
242 filing of the original complaint, Plaintiff has made inquiry and found evidence of knowing and
243 deliberate criminal acts by lenders intended to defraud Plaintiff of Plaintiff's property and is
244 prepared to file a more definite statement with the court.

245 **CONCLUSION**

246 (34) Plaintiff maintains that Defendant(s) motion of dismissal is without merit, and that counsel,
247 in making said claim, has failed to speak with candor with the court.

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251 Respectfully Submitted,

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255 **Joseph Trinidad**
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292 VERIFICATION
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295 I, Joseph Trinidad & Anthony E. Paupaw, do swear and affirm that all statements made herein
296 are true and accurate, in all respects, to the best of my knowledge.

297 Joseph Trinidad Anthony E. Paupaw
298 3513 Covent Oak Court
299 High Point, NC 27265
300
301
302

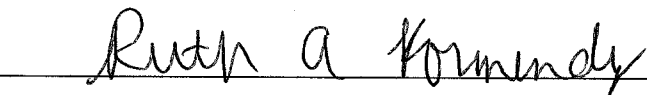
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304 **Joseph Trinidad**
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Anthony E. Paupaw

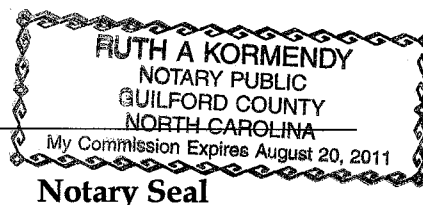
306 The Persons above, who proved to me on the basis of satisfactory evidence to be the persons
307 whose names are subscribed to this document and acknowledged to me that they executed the
308 same in their authorized capacity and that by his signature on this instrument who are the
309 persons who executed this instrument.

310 I certify under PENALTY OF PERJURY under the laws of this State that the foregoing
311 paragraph is true and correct.
312

313 Witness my hand and official seal.
314

315 

316 **NOTARY PUBLIC IN AND FOR**
317 **THE STATE OF NORTH CAROLINA**
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CERTIFICATE OF SERVICE

We, Joseph Trinidad and Anthony E. Paupaw, do swear and affirm that we have served a signed copy of this Response to defendants motion to dismiss to any and all defendants by way of U.S.P.S. regular mail on the 16th day of November, 2010..

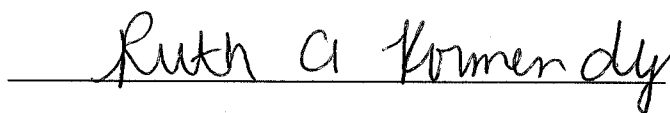

Joseph Trinidad


Anthony E. Paupaw

The Persons above, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to this document and acknowledged to me that they executed the same in their authorized capacity and that by their signatures on this instrument who are the persons who executed this instrument.

I certify under PENALTY OF PERJURY under the laws of this State that the foregoing paragraph is true and correct.

Witness my hand and official seal.



NOTARY PUBLIC IN AND FOR
THE STATE OF NORTH CAROLINA

